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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1651

EARL A. GARNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI
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Petitioner Earl A. Garner respectfully requests that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, which affirmed the district court's denial of petitioner's Motion for a New Trial.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit on Garner's direct appeal is reported at 574 F.2d 1141 (4th Cir. 1978) and is annexed to this Petition as Appendix A. The decision of the district court denying Garner's Motion for a New Trial is not reported and is annexed as Appendix B. The decision of the Court of Appeals affirming the district court's decision, is also not reported, and is attached as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on January 11, 1980, and a timely petition for rehearing was denied by the Court of Appeals on February 20, 1980. On March 4, 1980, Chief Justice Burger granted Petitioner's Motion for an Enlargement of Time in which to file this Petition, until April 19, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether, under the Confrontation Clause and the Federal Rules of Evidence, a lengthy transcript of grand jury testimony of the government's leading witness may be introduced substantively against the defendant in the absence of cross-examination of the witness, where the government, after the trial, indicts the witness for perjury.

STATUTORY AND CONSTITUTIONAL PROVISIONS

Statutory and Constitutional provisions relevant to this Petition are United States Constitution, Amendment VI; Rule 804(b) of the Federal Rules of Evidence; and Rule 33 of the Federal Rules of Civil Procedure. They are set forth in full in the Appendix.

STATEMENT OF THE CASE

This Petition raises a question related to, though in a significantly different posture from, issues raised in Petitioner's prior request for review of his conviction by this Court. Earl Garner was convicted and sentenced to a thirty year term of imprisonment almost exclusively on the basis of the grand jury testimony of a witness who did not testify at trial and who was never subjected to cross-examination. Garner was indicted in the Eastern District of Virginia along with co-defendant Everett McKethan on two counts of narcotics conspiracy, conspiracy to import heroin under 21 U.S.C. §963, and conspiracy to import heroin under 21 U.S.C. §846. The indictment charged that in late 1974 and early 1975 the two defendants were engaged in a scheme to import heroin into the United States for purposes of distribution. In addition, Garner was charged with two substantive counts of narcotics importation under 21 U.S.C. §952(a) and 18 U.S.C. §2.

In order to establish Garner's guilt on one of the substantive counts of im-

porting heroin from Europe in October, 1974, the government introduced the testimony of one Mary Ann McKee. From her evidence, the jury might have found Garner guilty of a single count of narcotics importation. The remainder of the government's case against Garner on the two conspiracy counts, and the foundation for the introduction of critical documentary evidence of certain European trips by Garner, consisted of the grand jury testimony of a man named Warren Robinson. Without giving a reason, Robinson refused to testify at trial, despite warnings from the court, a grant of immunity, an order to testify and threats of severe punishment if he did not.

When it became clear that Robinson's testimony would not be forthcoming, the court suggested that the government tender testimony Robinson had given to the grand jury for admission into evidence, pursuant to Rule 804(b)(5) of the Federal Rules of Evidence, the residual hearsay exception applicable to statements from unavailable witnesses. The court later offered its view that Rule 804(b)(5) "obviates or supercedes" exceptions (b)(1) through (b)(4), the traditional hearsay exceptions for prior testimony subject to cross-examination, statements against interest, dying declarations and statements of family or personal history. Before reading the testimony, the court decided that Robinson's testimony had equivalent guarantees simply because it was given under oath.

Robinson had testified before a grand jury on January 7, 1976, as part of an agreement with the government pursuant to

which he was permitted to plead guilty to a lesser offense arising out of a narcotics charge which had been brought against him. His grand jury testimony tended to implicate Garner and McKethan in a heroin importation conspiracy. Over the course of more than forty transcript pages, Robinson told the grand jury that he, Garner and McKethan began a series of five trips in the summer of 1974 for the purpose of importing heroin into the United States and selling it in the Washington area. Yet the testimony was permeated with leading questions, hearsay, multiple hearsay, questions lacking a proper foundation, and other evidentiary infirmities prohibited at trial but common to grand jury testimony. Robinson was present on only two of the five trips about which he testified, and much of his information came second and third hand (and never from Garner). Indeed, the travel documents the government itself introduced at trial contradicted Robinson in material respects, especially as to the three trips on which Robinson was not present.

On the second day of trial, recognizing the problem the defendants faced without the opportunity to cross examine Robinson, the prosecutor expressed serious doubt about the admissibility of the grand jury testimony and stated:

> . . . I think what we get into in this area is the question of due process, and that is that the evidence must have enough reliability to satisfy the requirement that a person can be convicted upon substantial evidence.

The prosecutor accordingly declined to offer Robinson's grand jury testimony. His decision, however, was overruled by his superiors, and the government then tendered the grand jury testimony. The court admitted the testimony, including all hearsay and leading questions about all five trips, and it was read to the jury. The court then recalled Robinson for "cross-examination" concerning his grand jury testimony. He continued to refuse the testify, but did state that the testimony was a "mistake" and that the testimony was "untrue."

In reviewing Garner's direct appeal, the Court of Appeals did not take Robinson's denials of the truth of his grand jury testimony at face value. Rather, the Fourth Circuit interpreted those denials simply as an effort to avoid testifying:

> The [trial] transcript gives one the general impression not that the grand jury testimony was false, but that, whatever pressures were brought upon him, the defendant (sic) was unwilling to testify. Garner v. United States, 574 F.2d at 1143.

The government, however, took a different view. Subsequent to the resolution of his direct appeal, and while Garner's Petition for Writ of Certiorari was pending before this Court, the government indicted the witness, Robinson, for perjury under 18 U.S.C. §1623 in connection with his grand jury testimony and his testimony at Garner's trial. Robinson eventually entered a plea of guilty to a related charge of contempt, in exchange for which perjury charges were

dropped.

Garner brought these facts to this Court's attention while his original Petition for a Writ of Certiorari was pending, and Justice Stewart, joined by Justice Marshall, considered that perjury indictment in his dissent from the Court's denial of Certiorari, 439 U.S. 936 (1978). The lower courts, however, had not had an opportunity to review the significance of the perjury indictment. Accordingly, after this Court denied Garner's Petition, he filed a motion for a new trial in the district court.

Meanwhile, in late 1978, Robinson was again indicted, this time in the Southern District of New York, for conduct having nothing to do with any matters concerning Garner's trial or the events which led to it. Count VI of that indictment charged Robinson with obstruction of justice under 18 U.S.C. §1503 for influencing, intimidating and impeding a witness in a court and grand jury of the United States.

Garner's Motion for a New Trial was denied by the District Court on December 11, 1978. That decision was affirmed per curiam by the Court of Appeals on January 11, 1980, which held that Garner was attempting to reargue an issue previously decided by that court. It did not address either its prior interpretation of Robinson's denials of the truth of his testimony in light of the perjury indictment or the New York obstruction of justice indictment against Robinson.

REASON FOR GRANTING THE WRIT

THE COURT SHOULD RESOLVE A CONFLICT OF CIRCUITS ON THE COMPELLING QUESTION WHETHER THE FEDERAL RULES OF EVIDENCE OR THE CONFRONTATION CLAUSE PERMIT CONVICTIONS ON CONSPIRACY CHARGES ON THE BASIS OF GRAND JURY TESTIMONY ALONE

This case raises in a dramatic fashion one of the fundamental issues of procedural justice, whether the lack of opportunity to cross examine the government's leading witness is tantamount to conviction by a "paper transcript," Dutton v. Evans, 400 U.S. 74, 87 (1970), or trial by affidavit. It also presents the question whether a "residual" hearsay exception contained in the Federal Rules of evidence may be construed to allow a criminal conviction on two narcotics conspiracy counts by hearsay grand jury testimony alone. These questions, which have such vast consequences for the adversary system that they must be answered by this Court. The factual setting in which those questions arise -- the use of testimony of a witness who, after trial, was indicted for perjury and obstruction of justice -- makes this case a particularly compelling one for review.

In the past, it was extremely rare for the government to attempt to introduce into evidence grand jury testimony of a witness unavailable for trial. As the testimony here demonstrates so well, grand jury testimony is invariably taken in an atmosphere in which the prosecutor leads the witness, suggests answers, cajoles and often coerces. There is no hint of cross-

examination. Hearsay and multiple hearsay answers are common, even invited by the prosecutor for investigative reasons. Finally, it is given out of the defendant's presence; as Judge Widener observed in dissent in United States v. West, 574 F.2d 1131 (4th Cir. 1978)

> [W]e must recognize that a witness will often make accusations behind the back of the accused which he will not repeat to his face. 574 F.2d at 1141.

For these reasons, its use at trial, except as a prior inconsistent statement, has long been forbidden.

Now, however, invoking the residual, new hearsay exception of the Federal Rules of Evidence, Fed.R.Evid. 804(b)(5), the government is attempting with even greater frequency to admit the evidence. That narrowly drawn rule permits such statements to be admitted only if certain conditions are met. These conditions require that the statement contain equivalent guarantees of trustworthiness equivalent to those of traditional exceptions, that notice of its proposed use be given to the opposing party, and that the general purpose of the Rules of Evidence and the "interests of justice" will be best served by admission of the testimony.

The question here is whether the catch-all exception, with its explicit qualifications and limitations, and consistent with the Confrontation Clause, permits the government to a conviction through the use of grand jury testimony when a witness is not available. The question has received conflicting

answers in courts of appeals. Besides the majority here, one circuit has held that Rule 804(b)(5) may permit admission of a witness' grand jury testimony, United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976), cert. denied, 413 U.S. 914 (1977). Another circuit arrived at the opposite result, suggesting that Rule 804(b)(5) rarely, if ever, permits use of grand jury testimony at trial under these circumstances. United States v. Gonzales, 559 F.2d 1271 (5th Cir. 1977). Neither of these decisions reached the Confrontation Clause issue. On the other hand, the Second Circuit, in an opinion by Judge Friendly, has held that, aside from any considerations under applicable rules of evidence, the admission of the grand jury testimony of a witness who is not available for cross-examination either at trial or at the time the testimony is given is forbidden by the Confrontation Clause of the Sixth Amendment. United States v. Fiore, 443 F.2d 112 (2d Cir. 1971). See, California v. Green, 399 U.S. 149 (1970); Nelson v. O'Neil, 402 U.S. 622 (1971). Finally, in a concurring opinion in United States v. Balano, No. 78-1314 (10th Cir. Dec. 18, 1979), Judge McKay specifically criticized the Fourth Circuit's analysis of the evidentiary questions in this case.[1/] The legislative history counsels that Rule 804(b)(5) is intended to be used "very rarely, in only exceptional circumstances." Sen. Rept. No. 93-1277, 93rd Cong., 2d Sess. at 20(1974).

Those conflicts alone would warrant a

[1/] The other two members of the panel did not reach the question.

grant of Certiorari. The issue here, however, is a posture most appropriate to this court's initial consideration of these issues. In affirming the district court's denial of a new trial, the Court of Appeals created an additional conflict. The Ninth Circuit has held, even in circumstances in which a witness has been available to testify, that the government's subsequent indictment of a leading witness for his perjury, even in a different case, requires a new trial. United States v. Chisum, 436 F.2d 645 (9th Cir. 1971); Williams v. United States, 500 F.2d 105 (9th Cir. 1974). In those cases, the government's leading witness pled guilty to an indictment charging perjury, among other charges. Relying on Mesarosh v. United States, 352 U.S. 1 (1956), the Ninth Circuit held that the defendants' convictions were tainted and a new trial was required.[2/] In those cases, of course, the witness was subject to cross-examination; here, Garner's conviction was premised on Robinson's uncross-examined testimony. Furthermore, Robinson was not only indicted for perjury in connection with this case, but later was indicted for intimidating a witness

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[2/] The district court distinguished these cases on the ground that Robinson's denial of the truth of his grand jury testimony was placed before the jury. Under Rule 104(a) of the Federal Rules of Evidence, however, the judge must determine questions relating to the admissibility of evidence, including trustworthiness under Rule 804(b)(5).

before a court and grand jury, further demonstrating the government's view of his disrespect for the oath he took at the grand jury. See, Elder v. United States, 142 F.2d 199, 200 (9th Cir. 1944). The decisions of the Ninth Circuit and the court below here cannot be reconciled.

Given the conflict in circuits, the importance of the question presented and a procedural posture which permits a narrow ruling on a complex issue, the Court should grant the Petition.

CONCLUSION

For the foregoing reasons, Petitioner urges that this Court issue a Petition for Certiorari to review the decision below.

Respectfully submitted,

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Date: April 18, 1980

A P P E N D I X

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1222

UNITED STATES OF AMERICA,
Appellee,

v.

EARL A. GARNER,
Appellant.

No. 77-1224

UNITED STATES OF AMERICA,
Appellee,

v.

EVERETT C. McKETHAN,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF VIRGINIA, AT ALEXANDRIA

J. Calvitt Clarke, Jr., District Judge

Argued
June 10, 1977

Decided
February 17, 1978

R E V I S E D O P I N I O N

Before HAYNSWORTH, Chief Judge, WIDENER and HALL, Circuit Judges

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Michael McGettigan (George F. West, Jr., Murphy, McGettigan, McNally & West on brief) Leonard S. Rubenstein (Philip J. Hirschkop, Philip Hirschkop & Associates, Ltd. on brief) for Appellants; James R. Hubbard, Assistant United States Attorney (William B. Cummings, United States Attorney, Justin W. Williams, Assistant United States Attorney, Leonie Milhomme Brinkema, Special Assistant United States Attorney on brief) for Appellee.

HAYNSWORTH, Chief Judge:

Convicted of drug related offenses arising out of the alleged importation of substantial quantities of heroin from West Germany and Holland, the defendants complain primarily of the admission in evidence of the grand jury testimony of an alleged co-conspirator who declined to testify at the trial despite the best efforts of the trial judge and his own lawyer to get him to do so.

I.

Warren Robinson, the grand jury witness, had been indicted for offenses committed by him in connection with the importation of the heroin. He had previously commenced serving a six year sentence imposed upon him for unrelated offenses, and he was under indictment in New York for still other unrelated offenses. Faced with the possibility that very heavy penalties might be imposed upon him if convicted under this indictment, he entered into a plea agreement. The agreement was that he would enter a plea of guilty to a two-count information, would testify fully before a grand jury and in any ensuing criminal proceedings, in exchange for which the government would dismiss the indictment. There was no agreement respecting the disposition of the New York charges.

Robinson entered his guilty pleas to the two counts in the information, and was sentenced to two successive five year terms to commence upon completion of his earlier six year sentence. He then appeared as a seemingly willing witness before a grand jury.

He told the grand jury that Garner had approached him with information that McKethan, an airline employee, had a source for large quantities of heroin in West Germany. Garner sought to enlist Robinson's participation in the importation of heroin from western Europe and its distribution in the metropolitan Washington area.

There followed a number of trips to West Germany and to Holland, where another source of supply had been developed with the assistance of their first contact. Robinson did not get his passport in time to make Garner's first trip, but he and Garner traveled together on two later ones, and he was told by the defendants of still later trips that they took. On one of the trips Garner and Robinson were accompanied by two young women who, traveling separately on the return trip, brought the heroin into the United States concealed in their girdles.

Before Garner and McKethan were brought to trial, Robinson indicated reluctance to testify at trial. This occasioned inquiry of him in an in camera proceeding before the trial opened. He then stated that in the absence of his lawyer he would not testify. His lawyer was summoned and advised him to testify, but to no avail. After the trial opened, though the court had granted him use immunity and threatened him with a contempt citation if he refused, he persisted in his refusal to testify. In another in camera proceeding, Robinson indicated that he might answer questions put by defense counsel. The district court then ruled that, though he was "unavailable" as a witness within the meaning of Rule 804(b)(5) of the F. R. Evid., he was "available" for cross-examination by defense counsel. In the presence of the jury, Robinson stated that he knew Garner and McKethan and that his grand jury testimony was inaccurate. He answered some questions about European travel with answers which seemed to say that he knew

nothing of any drug trafficking by Garner or McKethan. At other times he declined to answer, and his seeming disclaimers of knowledge may have been understood by the jury to be the equivalent of a refusal to testify. The transcript gives one the general impression not that the grand jury testimony was false but that, whatever pressures were brought upon him, the defendant was unwilling to testify, and particularly unwilling to say anything which would incriminate either of these defendants.

There is no explanation of this unwillingness. Cooperating former co-conspirators have sometimes been the victims of threats by their former associates facing trials. That Robinson was the victim of threats by either Garner or McKethan, however, can be no more than speculation. Robinson was in prison at the time, and he may have been the victim of the code that condemns a conspirator for testifying against his former associates.

II.

In United States v. West, 4th Cir., ___ F.2d ___, we have upheld the admission of sworn grand jury testimony, though not subject to cross-examination, when the witness was murdered in the interim between his grand jury testimony and the trial of the drug offenders. In that case, there was extraordinary corroboration of the grand jury testimony, for he had been wired for sound; his conversations had been recorded; he had been kept under close surveillance when not within build-

ings, and the officers who had watched and recorded his conversations were witnesses available for cross-examination.

In United States v. Carlson, 8th Cir., 547 F.2d 1346, a grand jury witness refused to testify at Carlson's trial because, he said, of threats directed to him by Carlson. That, too, was a drug offense case. There was substantial circumstantial corroboration of the grand jury testimony. Because of that, and a general affirmation by the witness at trial of his grand jury testimony, the Eighth Circuit held the grand jury testimony admissible under Rule 804(b)(5). As to the Confrontation Clause, it held that Carlson had waived his right, reasoning that Carlson should not be allowed to complain of the silence of the witness when he was the procuror of the silence. See Motes v. U.S., 178 U.S. 458, 471-472.

On the other hand, in United States v. Gonzales, 5th Cir., 559 F.2d 1271, the Fifth Circuit, in another drug offense case, held that the testimony of the grand jury witness was inadmissible. There the grand jury witness had been most reluctant to testify during his appearance before the grand jury, apparently torn between the possibility of injury to himself or his family if he testified and further imprisonment for contempt if he refused. Faced with these unpleasant alternatives, the pressure to testify may have prompted the witness falsely to identify the defendant as his employer, and the identity of the employer was entirely dependent upon the testimony of the witness.

Since we have canvassed this scene in West, we need not repeat it here. It is enough to recite that sworn grand jury testimony may be admitted under Rule 804 (b)(5) when there are substantial guarantees of trustworthiness equivalent to those which warrant recognized exceptions to the hearsay rule. The admission of such sworn testimony is not a violation of the Confrontation Clause of the Constitution if it bears sufficient guarantees of reliability and the circumstances contain a sufficient basis upon which the jury may assess its trustworthiness. The distinction is illustrated by the strong indicators of reliability found in West and the absence of such indicators in Gonzales. See also U. S. v. Rogers, 549 F.2d 490 (8th Cir. 1976), cert.denied ___ U.S. ___ (1977.

Here there are strong indicators of reliability, and the jury had an ample basis upon which to determine the trustworthiness of the testimony.

One of the two young women who, according to Robinson's grand jury testimony, had accompanied Garner and him on their trip to Amsterdam beginning on October 15, 1974, was produced as a witness at the trial. She fully confirmed Robinson's grand jury testimony about the trip. She, Miss McKee, and a Miss Hallums, had accompanied Garner and Robinson to Amsterdam for the purpose of serving as couriers. While in Amsterdam, Miss McKee shared a hotel room with Robinson, while Miss Hallums shared another nearby room with Garner. After Garner and

Robinson had procured the heroin, she testified, Robinson "blended" it into powder form and packaged it into two packages. This was done in a hotel room in which Garner and the two women were also present. Miss McKee "snorted" some of the heroin, and the men showed the girls how to conceal one package each in her girdle. The two girls then flew to Dulles, while the two men took another plane to New York, just as Robinson had testified. When the men got to Washington, Miss McKee testified she delivered the two packages of heroin to Garner, who was sitting on the passenger side of a car being driven by Robinson.

Moreover, there was irrefutable evidence of their travels. The United States introduced records of airline tickets, customs declarations, passport endorsements, and European hotel registrations. They show that McKethan made five trips to western Europe between mid-July 1974 and mid-March 1975. Garner made seven such trips in the same period. These records show that McKethan was in Amsterdam in early September 1974 when Robinson testified that he and Garner met him there and made their first contact with the Chinese supplier. McKethan and Garner were also in Copenhagen at the same time in December 1974 and apparently were traveling on the same flights to Copenhagen and Amsterdam in March 1975.

Moreover, the records show that Henry Thompson arrived at Dulles from Europe on September 4, 1974. Thompson was a member of the United States Armed Forces sta-

tioned in West Germany. He was McKethan's cousin. On his entry form he noted that he would be staying with McKethan and that McKethan was a person who would know his whereabouts. Robinson had testified that Garner had used Thompson, their initial heroin contact in Europe, as a courier after Garner's first trip, although the available records indicate that Thompson was on the same flight with Garner and Robinson returning from their first joint trip. Testifying from his recollection more than a year later, Robinson may have been confused about which trip Thompson made, but the record of Thompson's flight provides general corroboration of Robinson's testimony that he was used as a courier.

These travel records would contain no implication of guilt if the record contained any reasonable explanation of them consistent with innocence. If the defendants were stewards employed by Pan American Air Lines in international flights, their frequent European travels would contain no suggestion of wrong doing. Suspicion would not attach if they were reputable international businessmen with branches in Holland, Denmark and the United States. For others of us, however, having no patent occasion for frequent European travel, the sudden onset of successive trips of short duration alone can raise suspicion as long as any reasonable explanation is lacking. As to Garner, there is no suggestion of any such explanation. McKethan testified, however, and attempted to offer one but,

as a description of it will indicate, it may fairly be regarded as preposterous. The only believable explanation of the frequent trips is that offered by Robinson in his grand jury testimony, and the record of the trips strongly tends to corroborate the testimony.

McKethan was employed as a cargo handler by United Airlines in Washington National Airport. His airline employment, he testified, entitled him to very large discounts on airline fares, and he made his frequent trips to Frankfurt, Copenhagen, Amsterdam and London mostly for pleasure. For a while he had a girlfriend in Copenhagen, a fact that Robinson had mentioned. He was also learning the "language of the pyramids" from a black African in Europe,1/and he was busy making inquiries in Germany and Sweden about the importation into the United States of Mercedes-Benz automobiles and Swedish sheepskin jackets. He did not suggest how an airline cargo handler might finance such businesses, nor was any such business developed.

Robinson, in his grand jury testimony, did not suggest that McKethan was a part of the distribution business conducted jointly by Garner and Robinson for a

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1/ According to McKethan, knowledge of this "lost language of the pyramids" would enable him to arrive eventually at "logical procedures of understanding." McKethan sought in Copenhagen "rythm[s] of understanding."

number of months, and later separately by each, but did testify that McKethan was the one who initially suggested that he could put them in touch with Henry Thompson in Frankfurt as a source of supply. According to Robinson, he agreed to meet them in Frankfurt in September, but by the time Garner and Robinson arrived at Thompson's house, they were told by Thompson's girlfriend that she was to take them to Amsterdam. In Amsterdam they did meet McKethan and Thompson, who put them in touch with a Chinese supplier. According to Robinson, McKethan was paid some $10,000 for his part in arranging this source of supply for them. Later, Robinson had testified, McKethan agreed to meet Garner in Amsterdam for the purpose of showing Garner how to avoid the thorough searches made of passengers flying out of Amsterdam to the United States. This turned out to be no more than taking a train from Amsterdam to Copenhagen and flying from there to the United States. Afterwards McKethan complained to Robinson that Garner had not paid him the $7,000 he promised. Moreover, the joint trip by Garner and McKethan in March 1975, against this background, does not suggest that McKethan was off on an independent lark of his own.

McKethan did admit having received a payment of $3500 from Robinson on one occasion, but he claimed that he had set up a grocery business for Robinson, though none of the stock was issued in Robinson's name, and the $3500 was in payment for his services in setting up the grocery business.

McKethan's testimony does not tarnish the badges of reliability for Robinson's grand jury testimony. He offered innocent explanations of his frequent trips to Europe, but the jury was entitled to find the explanation incredible. The fact remains that the truthfulness of Robinson's grand jury testimony is strengthened by the testimony of Miss McKee and, particularly, by the airline tickets, customs declarations, passport endorsements, and hotel records. This is enough to satisfy the requirements of Rule 804(b)(5) and to avoid the bar of the hearsay rule. It also satisfies the requirements of the Confrontation Clause.

In this case, of course, Robinson did appear on the witness stand. Indeed, the defendants complain that this prejudiced their cases in the minds of the jurors, but the judge ordered the initial examination of Robinson in the presence of the jury in order that the jury would not be left with speculation about the reason for Robinson's absence, speculation which might have suggested inferences more hurtful to the defendants that Robinson's refusal to testify. He was presented for cross-examination only after Robinson had stated in an in camera hearing that he might answer the questions of defense counsel, and that he could not tell whether he would respond until they asked the questions. Though, as we have indicated earlier, the jurors may have taken Robinson's earlier disclaimers of knowledge as equivalent to a later explicit refusal to testify, they also may have

received such disclaimers, with Robinson's statement that his grand jury testimony was inaccurate, as exculpatory. In any event, the jury saw and heard Robinson on the witness stand. What they saw and heard may have been of substantial assistance to the jury in assessing the truthfulness of his grand jury testimony. We do not hold, however, that this cross-examination under these difficult circumstances was adequate to meet the requirements of the Confrontation Clause. Cf. U. S. v. Insana, 423 F.2d 1165 (2d Cir.) cert. denied, 400 U.S. 841 (1970; U. S. v. Mingoia, 424 F.2d 710 (2d Cir. 1970). It is enough that the grand jury testimony was admissible because of its strong corroboration by the testimony of Miss McKee and the undeniable records.

III.

Garner received two successive ten-year sentences under the federal narcotics conspiracy statute, one for conspiracy to import heroin in violation of 21 U.S.C. § 963 and one for engaging in a conspiracy to distribute heroin in violation of 21 U.S.C. § 846. He objects to the imposition of two successive sentences upon him, claiming that there was one conspiracy though it encompassed both importation and distribution.

The Supreme Court in Braverman v. United States, 317 U.S. 49 (1942), held that under the general conspiracy statute 2/ Congress intended to authorize

2/ 18 U.S.C. § 371

the imposition of only one sentence, though any given conspiracy may contemplate the commission of more than one substantive crime. What is required, however, is that each separate conspiracy statute be examined to determine the congressional intent with respect to the possible imposition of successive sentences. 3/ With respect to the federal narcotics conspiracy statutes, this was carefully done by the Fifth Circuit in United States v. Houltin, 525 F.2d 943 (5th Cir. 1976), modified in 553 F.2d 991. 4/ For the reasons stated by the Fifth Circuit in Houltin, we think that in enacting the federal narcotics acts the Congress regarded conspiracy to import heroin and conspiracy to distribute heroin in the United States nor only as separate offenses but as offenses so compounding each other that a conspiracy embracing each should be treated as two separate conspiracies, warranting the imposition for successive sentences for violations of the two separate conspiracy statutes.

IV.

The defendants advanced a number of

3/ Simpson v. United States, __ U.S. __, 46 U.S.L.W. 4159 (1978); Gore v. United States, 357 U.S. 386 (1958).

4/ Accord United States v. Marotta, 518 F.2d 681, 685 (9th Cir. 1975). But see U. S. v. Honneus, 508 F.2d 566 (1st Cir. 1974); U.S. v. Adcock, 487 F.2d 637 (6th Cir. 1973).

other contentions of less moment, but we find no reversible error in any of them.

AFFIRMED.

WIDENER, Circuit Judge, concurring and dissenting:

While I concur in Parts III and IV of the opinion, I respectfully dissent to admitting the grand jury testimony for the reasons I have expressed in United States v. Payne, 492 F2d 449 (4th Cir. 1974), and United States v. West, et al., Nos. 76-1837/1838/1839/1840/1841/1842/1843 (4th Cir. 1978).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

NO. 76-153-A

UNITED STATES OF AMERICA,

Plaintiff,

v.

EVERETT C. MCKETHAN,
and
EARL A. GARNER,

Defendants.

OPINION AND ORDER

The defendants, who were tried together before a jury on several counts involving the importation of heroin into this country from Europe and who were found guilty on some counts of the indictment on October 12, 1976, now move the Court for a new trial pursuant to Rule 33, Fed.R.Crim.P. During the course of the trial, the Court permitted the testimony which Warren G. Robinson had previously given before a grand jury to be read to the petit jury trying Mr. McKethan and Mr. Garner. Mr. Robinson also testified before the petit jury trying Mr. McKethan and Mr. Garner. There were discrepancies between the testimony of Mr.

Robinson before the grand jury and before the petit jury. The United States subsequently sought and received from a later grand jury an indictment charging Warren G. Robinson with two counts of perjury and one count of contempt of court. The contempt count arose out of Robinson's refusal to testify fully before the petit jury trying Mr. McKethan and Mr. Garner in accordance with the trial judge's instructions. On July 7, 1978, Mr. Robinson entered a plea of guilty to the contempt count and the two perjury counts were dismissed as a result of a plea bargain between Mr. Robinson and the united States Attorney.

Mr. McKethan and Mr. Garner now move this Court to set aside their convictions on the ground that the testimony of Mr. Robinson on which the United States relied is now tainted because the United States itself has charged in the later indictment of Mr. Robinson that such testimony was untruthful. In support of their position, the defendants cite Rule 33, Federal Rules of Criminal Procedure, which permits the court to grant a new trial if required in the interests of justice when a motion is based upon newly discovered evidence. The defendants further rely upon Elder v. United States, 142 F.2d 199, 200 (9th Cir. 1944); United States v. Williams, 500 F.2d 105 (9th Cir. 1974); United States v. Miramon, 443 F.2d 361 (9th Cir. 1971); United States v. Davis, 442 F.2d 72 (10th Cir. 1971); United States v. Chisum, 436 F.2d 645 (9th Cir. 1971); Mesarosh v. United States, 352 U.S. 1 (1956).

The theme running through all of the cases pertinent to the issue cited by the

defendants is that the United States relied upon the evidence of a witness who was later denounced by the United States as being untruthful in respect to evidence given concerning the same transaction or similar transactions about which the witness testified. The cases cited have vacated convictions and have ordered new trials because of the tainted testimony. This Court easily distinguishes the case at bar from the authorities relied upon by the defendants. In the case at bar, the defendants' motions to vacate the convictions and for a new trial on the basis of newly discovered testimony relies on the Government's claim that the testimony given by Robinson before the grand jury and given before the petit jury differed. It is clear that the defendants are not relying upon newly discovered evidence but are only relying upon an indictment for perjury requested by the United States and issued by a grand jury. The fact of the discrepancy in testimony of Robinson was not discovered subsequent to the trial of Mr. McKethan and Mr. Garner as was the case in all of the authorities cited by the defendants. The petit jury trying Mr. McKethan and Mr. Garner had before them for consideration both versions of Mr. Robinson's testimony and thus had the opportunity to weigh his credibility and to accept or reject such of that testimony as they felt proper. It is implicit in all of the cases cited by the defendats where new trials were awarded that the purpose of the new trial was to give a jury considering the guilt or innocence of a defendant an opportunity to weigh the testimony of the accusing witness in light of

his after discovered untruthfulness. The defendants in this case have already been tried by a jury aware of the obvious untruthfulness of Mr. Robinson in one version or the other of his testimony. Thus, the defendants have already had the benefit of the only relief requested by their motions, that is, a jury's consideration of the discrepancies in the accusing witness's testimony.

For the reasons stated, the motions of the defendants are DENIED.

* * * *

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 79-6101

UNITED STATES OF AMERICA,
Appellee,

v.

EVERETT C. MCKETHAN,
Appellant.

NO. 79-6102

UNITED STATES OF AMERICA,
Appellee,

v.

EARL A. GARNER,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF VIRGINIA, AT ALEXANDRIA

J. Calvitt Clarke, Jr., District Judge

Argued
December 3, 1979

Decided
January 11, 1980

Before HAYNSWORTH, Chief Judge, BUTZNER
and FIELD, Circuit Judges

Leonard S. Rubenstein for Appellant Garner; (Michael McGettigan on brief) for Appellant McKethan; Karen Rebrovich, Assistant U.S. Attorney (William B. Cummings, United States Attorney, Justin W. Williams, Assistant U.S. Attorney, Leonie M. Brinkema, Assistant U.S. Attorney on brief) for Appellee.

PER CURIAM:

This is a joint appeal from a denial of a Rule 33 (newly discovered evidence) motion for a new trial. In essence, the defendants are attempting to reargue an issue this court previously decided adversely to them. United States v. Garner, 574 F.2d 1141 (4th Cir. 1978). This attempt to recharacterize the issue has no merit. There is no newly discovered evidence. The order of the district court is affirmed. See United States v. McKethan, Cr. No. 76-153-A (E.D. Va. December 11, 1978).

AFFIRMED.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 33

NEW TRIAL

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

UNITED STATES CODE, TITLE 21

§846. ATTEMPT AND CONSPIRACY.

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

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§963. ATTEMPT AND CONSPIRACY.

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Rule 804

HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

* * *

(b) HEARSAY EXCEPTIONS. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) FORMER TESTIMONY. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with the law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) STATEMENT UNDER BELIEF OF IMPENDING DEATH. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) STATEMENT AGAINST INTEREST. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and

offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) STATEMENT OF PERSONAL OR FAMILY HISTORY. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) OTHER EXCEPTIONS. A statement not specifically convered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or

hearing to provide the adverse party with a fair opportunity to prepare to meet it, including the name and address of the declarant.